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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDDIE LEE SMITH,

Defendant and Appellant.

C061035

(Super. Ct. No. 05F10238)

A jury found defendant Freddie Lee Smith guilty of making criminal threats, and found he had a prior serious felony conviction. (Pen. Code, §§ 422, 667, subds. (b)-(i), 1170.12.)¹ Sentenced to four years in state prison, defendant appeals. He contends the trial court erred by failing to give a jury unanimity instruction (CALCRIM Nos. 3500 & 3501). We affirm.

BACKGROUND

Defendant and Samia Carter dated for a few months, but ended their relationship in November 2005. On November 15,

¹ Undesignated statutory references are to the Penal Code.

2005, after their break up, defendant went to Carter's apartment to retrieve a cell phone he had given her.

Carter was sitting at the kitchen table when defendant arrived, writing down telephone numbers she had stored in the phone. Defendant leaned against the wall and watched as she wrote, making Carter feel nervous and uncomfortable. An argument ensued about the cell phone and Carter told defendant to "take the fuckin' phone and leave." Defendant said, "Bitch, I'm going to fire on you. I'm going to knock your teeth out of your mouth right now." Defendant then grabbed the cell phone and yanked the chair out from under Carter, who fell to the ground as a result.

Carter cursed at defendant, pushed him on the shoulder, and told him to leave. She told her son and her friend's son, who were present, to run to the master bedroom. Defendant said, "Where is my strap? I'm going to smoke you."² Carter was scared. She told her friend to call the police and ran to the bedroom. Defendant followed her, yelling, "I'm going to kill you, you fuckin' bitch, I'll get somebody to kill your ass."

Carter picked up a hot clothes iron for protection. Defendant was approximately eight feet away. She yelled at him not to get any closer and to "just leave." Defendant left, yelling, "Wherever you go, you better not see me. I'm going to leave right now. But whatever location you see me, I'm going to

² "Strap" is slang for "gun" and "smoke" is slang for "shoot."

fuck you up, bitch. I'm going to have five bitches fuck you up." Defendant punched a hole in the wall by the front door as he left the apartment.

Carter's friend reported that defendant made several additional threats during the incident. While Carter and defendant were arguing about the phone, defendant said, "Bitch, what did you just say to me? I will bust your head off." While defendant was yelling at Carter near the bedroom, he said, "Bitch, I'll kill you. I'm going to smoke you. I'm going to get my home girls to jump you. Where's my pistol at? I'm going to get my pistol. I'm going to smoke you."

Defendant did not testify at trial. In his defense, his counsel argued that Carter had been upset because of her previous experiences with other men and domestic violence and had exaggerated the incident.³ He argued that defendant had not really threatened Carter, but rather, both defendant and Carter knew he was simply humiliated and "mouthing off" during a heated argument.

DISCUSSION

Defendant contends the trial court erred in failing to give a jury unanimity instruction. He argues the evidence supported three separate charges of criminal threats, creating the possibility of a conviction even though jurors did not agree about which statement constituted a violation of section 422.

³ Carter had to be taken into custody and compelled to testify at defendant's trial.

In a criminal case, a jury verdict must be unanimous. In addition, the jury must unanimously agree the defendant is guilty of a specific crime. Therefore, when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. If, however, the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or theory whereby the defendant is guilty. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required if the acts proved constitute a continuous course of conduct. (*People v. Naples* (2002) 104 Cal.App.4th 108, 115-116.) The continuous conduct rule applies when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Here, the evidence showed defendant made a continuous series of threats to Carter during their argument. The threats were so closely connected in manner and time that they formed a single transaction. (Cf. *People v. Diedrich* (1982) 31 Cal.3d 263, 282.) Defendant offered essentially the same defense to the entire course of conduct, i.e., that Carter had exaggerated and defendant had just been "mouthing off." Thus, no unanimity instruction was required.

In any event, even if a unanimity instruction should have been given, its omission is harmless beyond a reasonable doubt if the jury could not reasonably have found that the defendant did some acts but not others charged in the same count. (*People v. Deletto* (1983) 147 Cal.App.3d 458, 471.) No disagreement is possible where defendant's various acts were indistinguishable such that the jury equally would have convicted defendant of any and all acts, or where the defendant presented a unitary defense applying equally to all the acts. (*People v. Diedrich, supra*, 31 Cal.3d at p. 283; *People v. Jones*, (1990) 51 Cal.3d 294, 307; *People v. Gordon* (1985) 165 Cal.App.3d 839, 855-856, overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292, and *People v. Frazer* (1999) 21 Cal.4th 737, 765.)

Here, as we have stated, during closing argument, defense counsel presented a unitary defense. Counsel argued that Carter had exaggerated the incident, that defendant had not really threatened Carter, but rather, both defendant and Carter knew he was just "mouthing off" during a heated argument. Defendant's trial counsel did not claim that any particular one of the criminal threats was factually unsupported, as compared to the others. At most, he argued generally that they were all unsworn statements that were exaggerated or untrue.

Since the jury's verdict indicates that it disbelieved the only defense tendered, the failure to instruct on unanimity was harmless beyond a reasonable doubt. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.